STATEMENT OF

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BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

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MR. CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to appear today to discuss the subject of conflict of interest and federal advisory committees. In its invitation, the Committee requested that OGE "present testimony outlining the regulations regarding conflicts of interest for Federal Advisory Committees and the importance of preserving the integrity of this process." On behalf of OGE, I am pleased, therefore, to address the general statutory and regulatory framework governing financial conflicts of interest in the context of federal advisory committees.

As a general matter, the framework includes criminal statutes, administrative standards of conduct, and financial disclosure requirements. Because the focus of this hearing, as described in the invitation, is primarily on financial interests and the standards for waiving financial conflicts, I will begin with a discussion of the financial conflict of interest statute.

18 U.S.C. § 208

Chapter 11 of Title 18, United States Code, contains a number of criminal conflict of interest laws that were enacted in 1962 in a general overhaul of federal conflict of interest legislation. Among these laws is section 208 of Title 18, the basic financial conflict of interest statute. This statute is designed to help ensure that the integrity of Governmental operations and decisions will not be compromised by the conflicting financial interests of executive branch employees.

Section 208 is essentially a disqualification statute. It does not prohibit employees from holding any particular financial interest, but rather requires that they recuse themselves from certain matters affecting those interests. Moreover, it should be emphasized that neither section 208 nor any other ethics law or regulation governs the selection of individuals for particular federal positions; thus, for example, section 208 does not govern the selection of individuals for membership on a federal advisory committee, which is a subject governed by laws and regulations outside the jurisdiction of OGE.

Section 208 prohibits employees from participating, personally and substantially, in any particular matter which, to their knowledge, has a direct and predictable effect on their financial interests, or the financial interests of others with whom they have certain relationships. The statute applies if the Government matter would affect the financial interests of: the employee, the employee's spouse, minor child, or general partner; any organization which the employee serves as officer, director, trustee, general partner or employee; and any person or organization with which the employee is negotiating or has an arrangement concerning prospective employment.

Congress recognized, however, that this broad prohibition needed to be accompanied by certain reasonable waiver or exemption provisions. Therefore, the original 1962 act included, among other things, a provision permitting agencies to waive the disqualification requirement on a case-by-case basis. This provision, section 208(b)(1), authorizes agencies to grant a written waiver where they determine, in writing, that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services.

Special Government Employees

Given the subject matter of this hearing, it is important to note that section 208 applies not only to regular employees of the executive branch, but also to "special Government employees." Special Government employees, or SGEs, are defined as any officer or employee who is selected to perform temporary duties for no more than 130 days during any 365 day period. See 18 U.S.C. § 202(a). Many members of federal advisory committees are SGEs, who provide expert advice to the Government on a short-term or intermittent basis. (Not all advisory committee members, however, are SGEs. For example, some members are specifically designated as representatives of certain outside interest groups, and it is understood by the Government that they represent a particular bias. Pursuant to a longstanding interpretation, such representative members are not deemed federal employees at all and are not subject to the conflict of interest statutes, administrative standards of conduct, or financial disclosure regulations. See, e.g., 5 C.F.R. § 2634.904(b).)

SGEs serving on advisory committees provide advice to the Government on a broad range of important matters. According to the Twenty-Seventh Annual Report on Federal Advisory Committees, advisory committee members assist the Government in such diverse areas as national defense, small business, nuclear waste, and juvenile justice, to name but a few of the hundreds of subjects.

By way of background, the SGE category was created by Congress in 1962 as a way to apply an important, but limited, set of conflict of interest requirements, to a group of individuals who provide important, but limited, services to the Government. Commenting on the state of federal conflict of interest legislation prior to the 1962 act, the House Judiciary Committee observed that the restrictions were "excessive" in that they "failed to take into account the role, primarily in the executive branch of our Government, of the part-time or intermittent adviser whose counsel has become essential, but who cannot afford to be deprived of private benefits, or reasonably requested to deprive themselves, in the way now required." H.R. Rep. No 748, 87th Cong., 1st Sess. 4 (1961).

Consequently, Congress created a number of exceptions and exclusions for SGEs under several of the laws in Chapter 11 of Title 18. At that time, Congress did not create any special exceptions for SGEs under section 208. The executive branch, however, almost immediately issued guidance advising agencies that it was appropriate to exercise the waiver authority in section 208(b)(1) to release SGEs from the prohibition where they render "advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization" or, alternatively, "where the financial interests involved are minimal in value." Presidential Memorandum, "Preventing Conflicts of Interest on the Part of Special Government Employees," 28 Federal Register 4539, 4543 (May 2, 1963).

SGEs Serving on Advisory Committees

In 1989, President Bush appointed a bi-partisan commission to review and recommend reforms to the federal conflict of interest statutes, including those applicable to advisory committee members and other SGEs. The commission, chaired by Judge Malcolm Wilkey, included an entire chapter concerning SGEs and federal advisory committees in its final report. The Commission found that the Government needs advisory committee members with very specific outside expertise in the matters being examined, but that often those individuals would be likely to have employment and other financial ties with organizations whose interests would be affected by such matters. The existing waiver authority of section 208(b)(1) was deemed inadequate, because it focused in large measure on the magnitude of the SGE's financial interest, whereas "[f]or many advisory committee members, the financial interest may be quite large, but it may nonetheless be highly desirable to have the benefit of the individual's expertise." Report of the President's Commission on Federal Ethics Law Reform, at 30 (March 1989). While noting that "appropriate ethical constraints" are still needed for SGEs, the report emphasized: "In the absence of particularized provisions for the treatment of special Government employees within the general conflict of interest prohibition of 18 U.S.C. § 208, however, the Commission believes that the Government is needlessly handicapped in obtaining advice and information from individuals with expertise who are located in the private sector." Id. at 29 (March 1989).

Consequently, the Commission recommended, and Congress enacted almost verbatim, a liberalized waiver provision applicable to SGEs who serve on federal advisory committees within the meaning of the Federal Advisory Committee Act (FACA). Under this provision, enacted in 1989 as section 208(b)(3), an agency now has broad discretion to grant an individual waiver based on a written determination that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved. Such a waiver mechanism was deemed appropriate for several reasons: FACA itself includes a fair balance requirement that helps to protect against disproportionate influence by a particular interest group; FACA similarly requires that most advisory committee meetings be open, thus subjecting them to "the most exacting public scrutiny;" and advisory committee members typically are not the ultimate decisionmakers, but only advisors. Id. at 30.

The authority to issue waivers under section 208(b)(3) is vested in the employing agency. OGE does not have the authority to approve or disapprove waivers proposed by other agencies. Such authority properly resides in the agencies themselves, which are in the best position to determine whether the need for any particular individual's services outweighs any conflict of interest concerns.

OGE Regulations Governing the Issuance of Waivers under Section 208(b)(3)

Under Executive Order 12674, however, OGE is responsible for issuing regulations interpreting 18 U.S.C. § 208, including the provisions governing waivers. In 1996, OGE published regulations providing guidance to executive branch agencies concerning the issuance of waivers under section 208(b)(3). Specifically, in 5 C.F.R. § 2640.302(a), OGE explained the basic waiver standard and procedural criteria required by the statute. Furthermore, in section 2640.302(b), OGE provided a non-exclusive list of factors that agencies may consider in making their determination that the need for the individual's services outweighs the potential for a conflict of interest. These include various factors bearing on the nature and size of the conflicting financial interest and the Government's need for an SGE with the particular individual's qualifications, including the difficulty of finding other qualified SGEs who are not also conflicted.

Section 2640.303 sets out procedures for OGE consultation and notification regarding waivers issued under section 208(b)(1) or (3). Consistent with section 301(d) of Executive Order 12674, the rule provides that agencies, "when practicable," shall consult formally or informally with OGE prior to issuing any individual waiver under section 208(b)(1) or (3). In practice, many agencies consult in advance with OGE before issuing waivers. This may not happen, however, in connection with some waivers granted under section 208(b)(3) for advisory committee members. Based on discussions with agency ethics officials, we believe that the scheduling and agenda development for specific advisory committee meetings frequently create timing problems that make prior consultation impracticable. Moreover, at some agencies, ethics officials have developed more or less regular criteria for granting waivers based on past precedents, including past discussions with OGE about analogous situations, thus making prior consultation less crucial, in the view of those agencies, with respect to cases perceived as being routine or nonproblematic.

Exemptions Issued by OGE under Section 208(b)(2)

In addition to the authority of agencies to grant individual waivers, section 208 also authorizes OGE to issue regulations creating general exemptions from the disqualification requirement. Section 208(b)(2) allows OGE to exempt all employees, or certain classes of employees, with respect to those financial interests deemed to be too remote or inconsequential to affect the integrity of the services of those employees. In 1995, 1996 and again this year, OGE issued certain regulatory exemptions under this authority, which are found in Subpart B of 5 C.F.R. Part 2640.

Many of these exemptions apply to SGEs as well as regular employees. These include, for example, including certain *de minimis* exemptions for publicly traded securities and other

exemptions pertaining to mutual funds. However, certain exemptions apply only to SGEs serving on FACA committees. The most significant, section 2640.203(g), exempts certain financial interests arising from the SGE's outside employment. The exemption permits the employee to participate in matters of general applicability – such as general rulemaking or policymaking – provided that the matter does not have a special or distinct effect on either the SGE or the SGE's outside employer other than as part of a class.

Standards of Conduct Regulations

Beyond the criminal conflict of interest laws, OGE has promulgated regulations prescribing standards of ethical conduct for employees of the executive branch, including SGEs. See 5 C.F.R. Part 2635. One of those rules, 5 C.F.R. § 2635.502, provides a mechanism for dealing with potential appearances that an employee may lack impartiality with respect to certain matters. Section 2635.502 requires employees, including SGEs, to consider the need to recuse themselves from any matter involving specific parties where they have a "covered relationship" with a party or a representative of a party to the matter. "Covered relationship" includes, among other things, certain business, financial and contractual relationships that are not already covered by 18 U.S.C. § 208. However, like section 208, section 2635.502 has a waiver or "authorization" provision, which allows the agency to balance any concern about appearances of partiality against the Government's interest in having the individual participate in the matter.

Financial Disclosure

Finally, most SGEs serving on advisory committees are required to file a confidential financial disclosure statement with their agency, and they must do so no later than their first committee meeting. See 5 C.F.R. §§ 2634.904(b); 2634.903(b)(3). The agency then reviews the statements to determine whether the SGE may have any potential conflicts of interest that must be addressed.

Conclusion

In closing, I want to emphasize that it is vitally important to protect the integrity of federal advisory committee processes. It is axiomatic that Government decisions should not be tainted by the conflicting interests of federal employees. At the same time, it is understood that the Government needs the services of SGEs who can contribute relevant outside expertise and perspectives to the work of advisory committees. Balancing these two considerations is not always an easy task. Nevertheless, we believe that the current statutory and regulatory system provides an appropriate framework for accommodating both objectives.

I would be happy to answer any questions you may have.